

No. 12891

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

KWAN SHUN YUE,

Appellee.

APPELLEE'S BRIEF.

BENJAMIN W. HENDERSON,
448 South Hill Street,
Los Angeles 13, California,
Attorney for Appellee.

FILED

JUL 27 1950

TOPICAL INDEX

PAGE

Jurisdiction	1
Statement of facts.....	1
Questions presented on appeal.....	2
Argument	2
A. Petitioner's admission to the United States on November 13, 1925, as a treaty merchant entitled him to permanent residence for naturalization purposes.....	2
B. The certificate of arrival filed with the petition for naturalization is legally sufficient.....	10
Conclusion	11

TABLE OF AUTHORITIES CITED

CASES	PAGE
Cheung Sum Shee v. Nagle, 268 U. S. 336.....	6, 7, 9, 11
Chi Yan Cham Louie, Ex parte, 70 Fed. Supp. 493.....	8
Chung Yim v. United States, 78 F. 2d 43; cert. den. 56 S. Ct. 150, 296 U. S. 627.....	5
Goon Dip, Ex parte, 1 F. 2d 811.....	8
Haff v. Yung Poy, 68 F. 2d 203.....	8
Lo Hop v. United States, 257 Fed. 489.....	5
Pezzi, In re, 29 F. 2d 999.....	9, 10
Weedin v. Wong Tat Hing, et al., 6 F. 2d 201.....	2, 4, 6, 8, 9, 11
Wong Choon Hoi, Ex parte, 71 Fed. Supp. 160.....	8
Wong Sun Fay v. United States, 13 F. 2d 67.....	8

STATUTES

Act of December 17, 1943 (57 Stat. 600).....	7
Chinese Exclusion Act (22 Stat. 58).....	3
Chinese Exclusion Act, Sec. 6 (22 Stat. 58, Act of May 6, 1882)	2, 4
Immigration Act of 1924 (43 Stat. 153, 8 U. S. C. 201) :	
Sec. 3	5, 7
Sec. 5	7
Sec. 13(c)	5, 7
Sec. 15	5
Treaty Between the United States and China (22 Stat. 826)....	2, 7
United States Code, Title 8, Sec. 701.....	1
United States Code, Title 8, Sec. 732(c).....	10

TEXTBOOKS

Burlingame Treaties, 1880 (22 Stat. 826).....	3
Burlingame Treaties, 1894 (28 Stat. 1210).....	3

No. 12891

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

KWAN SHUN YUE,

Appellee.

APPELLEE'S BRIEF.

Jurisdiction.

Kwan Shun Yue filed his petition for naturalization in the United States District Court for the Southern District of California pursuant to provisions of 8 U. S. C. 701 (Jurisdiction to Naturalize) and the petitioner was admitted to citizenship.

This appeal is from the final order of admission entered by the trial court.

Statement of Facts.

The facts are not in dispute. An agreed statement appears in the transcript of record, page 1, and the statement as set forth in Appellant's Opening Brief is accepted.

Questions Presented on Appeal.

1. Whether the petitioner's residence in the United States since November 13, 1925, has been permanent and constitutes residence entitling him to be naturalized as a citizen of the United States.

2. Whether the certificate of arrival filed with his petition is legally sufficient.

ARGUMENT.

A. Petitioner's Admission to the United States on November 13, 1925, as a Treaty Merchant Entitled Him to Permanent Residence for Naturalization Purposes.

The Appellee is of Chinese race and applied for admission to the United States at Seattle, Washington, July 20, 1924, in possession of a certificate, as a treaty merchant, issued under provision of Sec. 6 of the Chinese Exclusion Act (22 Stat. 58, Act of May 6, 1882, as amended). His application to enter, together with similar applications of twelve others, was denied by the Department of Labor upon the grounds that the applicant was not a merchant within the meaning of the Immigration Act of July 1, 1924. A Writ of Habeas Corpus was granted by the trial court allowing the petitioners to land and the same was sustained on appeal. (*Weedin v. Wong Tat Hing, et al.*, 6 F. 2d 201.)

The question involved in *Weedin v. Wong Tat Hing, supra*, was whether or not the Immigration Act of July 1, 1924, had superseded or abrogated the treaty between the United States and China (22 Stat. 826) and the Chinese Exclusion Acts of 1882 and 1884 which were

passed for the expressed purpose of executing the stipulations of that treaty. The court said, at page 202:

“The appellees, who are merchants, were clearly admissible under the Act of 1884, and they are still admissible, unless excluded by some provision of the Act of 1924.”

The court then pointed out that the Act of 1924 did not supersede or abrogate either the treaty or the Chinese Exclusion Acts but that Chinese, including the subject of this appeal, were entitled to admission to the United States under provision of the treaty and the Acts of 1882 and 1884 and not under provision of the Act of 1924. At the bottom of page 202 the court states:

“For these reasons, we are of opinion that Chinese merchants are still entitled to be admitted to the United States; that the certificates prescribed by section 6 of the Act of 1884 are still the sole evidence permissible on their part to establish their right of entry into the United States; and, that the certificates, when produced, are still *prima facie* evidence of the facts therein stated.”

Prior to December 17, 1943, immigration and travel of Chinese to the United States was not governed by the United States Immigration Laws pertaining to aliens generally, but by the so called Burlingame Treaties. (22 Stats. 826, 1880 and 28 Stats. 1210, 1894, and the Chinese Exclusion Act 22 Stats. 58 etc.) The pertinent section of the treaty of 1880 reads as follows:

“Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in

the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation.”

The pertinent section of the treaty of 1884 reads as follows:

“The provisions of this convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants or travellers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitled such Chinese subjects as are above described to admission into the United States, they may produce a certificate from their Government or the government where they last resided fixed by the diplomatic or consular representative of the United States in the country or port whence they depart”

The Chinese Exclusion Act (22 Stats. 58 etc., Act of May 6, 1882, as amended) provided for execution of the treaties and the evidence required to permit the Chinese alien to enter the United States as a merchant and to reside here. Kwan Shun Yue, appellee herein, entered the United States in conformity with the provisions of these laws on November 13, 1925, as dictated by court order (*Weedin v. Wong Tat Hing, et al.*, 6 F. 2d 201) and has resided permanently in the United States since said date.

Chinese merchants, who lawfully entered the United States as such, under provisions of the applicable laws, were not required to maintain their status as merchants in order to remain here for permanent residence. (*Lo Hop*

v. U. S., 257 Fed. 489, 168 C. C. A. 493; *Chung Yim v. U. S.*, 78 F. 2d 43, cert. den. 1935, 56 S. Ct. 150, 296 U. S. 627.)

Alien Chinese were ineligible to citizenship in the United States until December 17, 1943.

Section 13(c), Immigration Act of 1924 (43 Stat. 153, 8 U. S. C. 201), provided as follows:

“No alien ineligible to citizenship shall be admitted to the United States unless such alien . . . (3) is not an immigrant as defined by Sec. 3,”

Section 3 of said Act as it stood November 13, 1925, read as follows:

“When used in this Act the term ‘immigrant’ means any alien departing from any place outside the United States destined for the United States, except, . . . (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a treaty of commerce and navigation,”

Section 15 of said Act provides as follows:

“The admission to the United States of an alien excepted from the class of immigrants by clause . . . (6) of Sec. 3, . . . shall be for such time and under such conditions as may be by regulations prescribed (including when deemed necessary . . . , the giving of bond with sufficient surety, in such sum and containing such conditions as may be by regulations prescribed) to insure that, at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States:”

These are the provisions of the Act of July 1, 1924, under which the Department of Labor attempted to bar entry of the appellee when he applied for admission to the United States on July 20, 1924, and which the courts then held did not apply to him but that he was admissible for permanent residence under terms of the treaty and the Chinese Exclusion Act as hereinafter pointed out.

It is submitted that the exact question now raised by appellant was raised and settled between the same parties in *Weedin v. Wong Tat Hing, et al.*, 6 F. 2d 201, and is now *res adjudicata*.

Cheung Sum Shee v. Nagle, 268 U. S. 336, further settles the point. This case went to the United States Supreme Court on a question certified out of the *Wong Tat Hing* case as to whether or not the Immigration Act of 1924 abrogated the Treaty of 1880 so as to make the wives and minor children of Chinese merchants inadmissible to the United States. The court held that the Act of May 26, 1924, did not abrogate the Treaty. At page 345 the opinion states:

“The wives and minor children of resident Chinese merchants were guaranteed the right of entry by the Treaty of 1880 and certainly possessed it prior to July 1, 1924, when the present Immigration Act became effective. (*U. S. v. Mrs. Gue Lim*, 176 U. S. 459.) That Act must be construed with the view to preserve Treaty rights unless clearly annulled, and we cannot conclude that, considering its history, the general terms therein disclose a congressional intent absolutely to exclude the petitioner from entry.

“In a certain sense it is true that petitioners did not come ‘solely to carry on trade.’ But Mrs. Gue Lim did not come as a ‘merchant’. She was never-

theless allowed to enter upon the theory that a treaty provision admitting merchants by necessary implication extended to their wives and minor children. The rule was not unknown to Congress when considering the Act now before us, nor do we think the language of Sec. 5 is sufficient to defeat the rights which petitioner has under the treaty. In a very definite sense, they are specified by the Act itself as 'non-immigrant.' They are aliens entitled to enter in pursuance of a treaty as interpreted and applied by the Court 25 years ago."

The foregoing decision is applied to consideration of Section 5 of the Immigration Act of 1924. The Government in the instant case contends that petitioner was admitted under Section 3 of the same Act. It must be noted that Section 13(c) of the same Act specifically prohibits the admission of petitioner as an "alien ineligible to citizenship" and the only law available to him at the time of his entry was the Treaty of 1880. The reasoning advanced by the Supreme Court in *Cheung Sum Shee v. Nagle* (268 U. S. 336), applies equally to Section 3 of the Immigration Act of 1924. The Act did not modify or abrogate the treaty in any respect and the petitioner was lawfully admitted under the terms of said treaty for permanent residence in the United States.

The treaty between the United States and China (22 Stat. 826) and the Acts of 1882 and 1884 constituted the sole and exclusive laws under provisions of which Chinese nationals were admissible to the United States until the Chinese Exclusion Acts were repealed on December 17, 1943 (57 Stat. 600). The effect of the Act of December 17, 1943, was to make persons of the Chinese race eligible to immigrate to and become citizens of the

United States by naturalization and for the first time made them subject to the Immigration and Naturalization Laws of the United States including the Immigration Act of July 1, 1924.

The cases uniformly hold that Chinese merchants admitted to the United States prior to July 1, 1924, under the provisions of the self-same treaty and acts as governed the entry of the present subject were admitted for permanent residence and are considered as having a lawful admission for permanent residence for naturalization purposes and that the children admitted after July 1, 1924, of fathers admitted prior to July 1, 1924, also are considered as having a lawful admission for permanent residence for naturalization purposes. Counsel finds no court decisions in the case of Chinese merchants arriving after July 1, 1924, except the instant case as reported in *Weedin v. Wong Tat Hing*, *supra*.

Other cases holding to the same effect are:

Haff v. Yung Poy, 68 F. 2d 203 (C. C. A. 9);
Ex parte Goon Dip, 1 F. 2d 811 (Judge Neterer);
Wong Sun Fay v. U. S., 13 F. 2d 67 (C. C. A. 9);
Ex parte Chi Yan Cham Louie, 70 Fed. Supp. 493;
Ex parte Wong Choon Hoi, 71 Fed. Supp. 160.

Appellant admits the sufficiency of the entry and the permanency of residence of Chinese merchants admitted prior to July 1, 1924, and to their children admitted after July 1, 1924, but denies the same status to the present subject Kwan Shun Yue who applied for admission to the United States on July 20, 1924, and was actually admitted on November 13, 1925, under the provisions of the self-same treaty and acts, after the Circuit Court of Ap-

peals, Ninth Circuit, and the United States Supreme Court established his right to enter under provision of the said treaty and acts and specifically held that the Act of July 1, 1924, did not supersede or abrogate the treaties and acts pertaining to Chinese.

Weedin v. Wong Tat Hing, et al., 6 F. 2d 201;

Cheung Sum Shee v. Nagle, 268 U. S. 336.

Even though the Court of Appeals and the United States Supreme Court specifically said the Act of July 1, 1924, did not supersede or abrogate the treaty and laws pertaining to Chinese and ordered the subject admitted in compliance with the prior existing treaty and acts pertaining to Chinese and held the rights of Chinese applying under provision of said laws to be unaffected by the Act of July 1, 1924, appellant still contends that the right of the subject Kwan Shun Yue to establish a permanent residence in the United States is governed by the Act of July 1, 1924. The contention does not make sense. The right of a Chinese on November 13, 1925, to admission and residence in the United States is measured by the same law as existed immediately prior to July 1, 1924. Kwan Shun Yue established lawful residence in the United States November 13, 1925, when the courts held he was eligible for admission to the United States for permanent residence. He has resided permanently here since said date and has met the residence requirement for naturalization purposes.

Appellant relies on the case *In re Pezzi*, 29 F. 2d 999, but points out that she "had entered the United States in 1925 as a non-immigrant alien. In 1926 she was granted permission by the Department of Labor to remain

in the United States indefinitely, *so long as her husband maintained his status as a treaty merchant.*" (Italics ours.) (Op. Br. p. 8.)

The status of Pezzi in the United States was conditional from the beginning and she never had any basis for permanency. Not so with the appellee herein. He was lawfully admitted under the provisions of the treaty and acts passed pursuant thereto as a merchant, for permanent residence, and with no provision or requirement to maintain his status or to ever depart from the United States.

The cases cited in support of the *Pezzi* case all involve persons who either entered the United States illegally or who remained in the United States beyond a specified time for which they were lawfully admitted. None of these facts exist in the instant case.

B. The Certificate of Arrival Filed With the Petition for Naturalization Is Legally Sufficient.

The law pertaining to the filing of a petition for naturalization reads in part as follows (8 U. S. C. 732(c)):

"At the time of filing the petition for naturalization there shall be filed with the clerk of court a certificate from the Service, if the petitioner arrived in the United States after June 29, 1906, stating the date, place, and manner of petitioner's arrival in the United States, . . . which certificate . . . shall be attached to and made a part of said petition."

The prescribed certificate of arrival in this case was provided by the Immigration and Naturalization Service and attached to and made part of appellee's petition for naturalization [Tr. 24]. Notwithstanding the decision of

the Circuit Court of Appeals (*Weedin v. Wong Tat Hing*, 6 F. 2d 201), and of the United States Supreme Court (*Cheung Sum Shee v. Nagle*, 268 U. S. 336) the Service seems to have insisted on entering a statement on said certificate that the alien "was lawfully admitted to the United States of America under Section 3(6) of the Immigration Act of 1924." However, this notation is mere surplusage since it is mere surplusage since it is not required under the law and the certificate does meet the full requirements in the following particulars:

"Name: Kwan Shun Yue.

Port of Entry: Seattle, Washington.

Date: November 13, 1925.

Manner of Arrival: SS President Grant." [Tr. 24].

Conclusion.

The appellee met all the requirements of the naturalization laws. He was lawfully admitted under terms of the treaty and in compliance with provisions of the Chinese Exclusion Act and such entry under court interpretation was for permanent residence so as to entitle appellee to naturalize under the act of December 17, 1943, relating to persons of the Chinese race.

The consternation of appellant relative to opening the gate to nationals of thirty (30) foreign countries who may enter as treaty merchants is unfounded since the treaties between the United States and China and the statutes effectuating said treaties together with the Chinese Exclusion Act were all peculiar to and applied only to Chinese. The primary purpose of these laws was to exclude Chinese coolie labor. They permitted entry and

residence in the United States of "merchants." Under these laws Chinese merchants were not required to carry on international as distinguished from local trade. Once admitted they were permitted to reside permanently in the United States and to bring their families for permanent residence with them. To the knowledge of Counsel no such provisions of law existed in any other trade treaties to which the United States was or is a party. This problem is peculiar to Chinese only. These laws pertaining to Chinese were repealed December 17, 1943, and the question can only affect a very small number of Chinese persons who entered the United States under provisions of said laws prior to December 17, 1943.

The certificate of arrival filed with the petition contains all the data required by law and is legally sufficient.

Judgment of the trial court should be sustained.

Respectfully submitted,

BENJAMIN W. HENDERSON,
Attorney in behalf of Appellee.